

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 25, 2006

STATE OF TENNESSEE v. SAMUEL L. GIDDENS, JR.

**Appeal from the Criminal Court for Davidson County
No. 2002-B-1184 J. Randall Wyatt, Judge**

No. M2005-00691-CCA-R3-CD - Filed March 13, 2006

A Davidson County Jury convicted the Defendant of reckless homicide, attempted especially aggravated robbery, and aggravated burglary. The trial court sentenced the Defendant to an effective sentence of fourteen years. On appeal, the Defendant contends that: (1) the evidence at trial is insufficient to support the jury's verdict; (2) the trial court improperly instructed the jury on the issue of criminal responsibility; (3) the Defendant's convictions for attempted especially aggravated robbery and aggravated burglary violate principles of double jeopardy; (4) the trial court erred when it allowed a witness to testify as to the alleged statement made by a co-defendant; and (5) the trial court improperly enhanced the Defendant's sentences and improperly imposed consecutive sentences. Finding there exists no reversible error, we affirm the judgements of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., Joined.

Jay Norman (at trial) and David M. Hopkins (on appeal), Nashville, Tennessee, for the Appellant, Samuel L. Giddens.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor (Torry) S. Johnson III, District Attorney General; Kathy Morante and Michael Rohling, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Background

The Defendant, along with co-defendant John W. Brewer, III, was indicted for one count of first degree premeditated murder (Count 1), one count of felony murder (Count 2), two counts of especially aggravated robbery (Counts 3 and 4), two counts of attempted first degree murder (Counts

5 and 7), one count of attempted especially aggravated robbery (Count 6), one count of aggravated burglary (Count 8), one count of possession with the intent to sell over .5 grams of a Schedule II substance (Count 9), and one count of unlawful possession of a Schedule VI substance (Count 10).

The trial court severed the Defendant's case from the co-defendant's case, and, at the completion of the Defendant's trial, the trial court granted a motion for judgment of acquittal as to Count 1, Count 5, and Count 7. The trial court found that the evidence was insufficient to support the charged offenses of especially aggravated robbery (Counts 3 and 4), but it allowed the jury to decide whether the Defendant had committed the lesser offenses of attempted especially aggravated robbery, attempted robbery, and attempted theft. Upon motion of the State, Count 9 and Count 10 were dismissed.

The jury found the Defendant not guilty of felony murder but found him guilty of the lesser-included offense of reckless homicide. The jury also found the Defendant not guilty of the attempted especially aggravated robbery as alleged in Count 3, but it found him guilty of attempted especially aggravated robbery as alleged in Count 4. The jury was unable to reach a verdict on Count 6, but it did convict the Defendant of Count 8, aggravated burglary.

The trial court sentenced the Defendant to four years for the homicide conviction, ten years for the attempted especially aggravated robbery conviction, and five years for the burglary conviction. It ordered that the Defendant's first two sentences run consecutively, for an effective sentence of fourteen years.

II. Facts

The following evidence was presented at the Defendant's trial: James Davis, Jr., an officer with the Nashville Police Department Patrol Division, testified that, on the day of the crime, he was called to 501 Pappas Court, and, when he walked into the apartment, he saw a gentleman, he later learned was Kelvin Johnson, sitting in a chair holding a bloody cloth against his stomach. This man told Officer Davis that he had been shot and said that other individuals were in the living room, where Officer Davis found a man sitting on a chair against the wall who said that he had been shot in the back or butt area. Officer Davis recalled that blood was on the floor, and the living room "was kind of ransacked." He testified that he scanned the living room area and saw two black men, one lying on top of the other, on the floor, and later he learned that the Defendant was on the bottom of these two men and that the victim, Larry Gamble, was on the top. Officer Davis also saw a handgun that lay to the left of these men and a magazine clip for a semi-automatic that lay on the living room coffee table. Officer Davis testified that the paramedics arrived, and they could not find a pulse for Gamble, but, after the paramedics rolled Gamble off of the Defendant, they found the Defendant's pulse. He testified that no one else moved the deceased's body before other officers arrived to photograph the crime scene. Officer Davis acknowledged that the paramedics had to move things around in the apartment in order to treat the wounded men.

On cross-examination, Officer Davis testified that he did not examine the handgun that lay on the floor, he could not recall if the handgun had a clip in it, and this handgun was four to six feet away from the clip on the coffee table. Officer Davis acknowledged that he observed a stocking cap on the floor near these two bodies, but he did not see this cap on the Defendant.

Kelvin Johnson testified that he lived in a house at 501 Pappas Court, and that, on the day of the crime, he was in the house with Charles Duane Thomas, Larry Gamble, his mother, and his two nieces. He recalled that he was sitting on the floor, Gamble was sitting on a love seat, Charles Duane Thomas was sitting on a couch, and his mother and two nieces were in a different room. Johnson said that he heard a knock at the side door and that when he opened the door, he saw a man that he later learned was Brewer on his porch. Brewer asked Johnson if he “could get a twenty-five,” a term Johnson understood to mean half a gram of cocaine. Johnson replied that they had “none of that here.” Johnson testified that he saw another man standing in his driveway, that he later learned was the Defendant, and asked Brewer who was in the driveway. Johnson testified that Brewer then pulled out a gun, pointed it at Johnson, and said “get down, . . . you know what this is.” Johnson got down, and the Defendant pulled out a gun and came up to the porch. Johnson said that Brewer demanded money, and Johnson gave him the contents of his pockets. Johnson told Brewer and the Defendant that there were a lot of people inside the house, and then Brewer told Johnson to keep quiet or Brewer would kill everyone in the house. Johnson said that Brewer lifted Johnson up and placed a gun in Johnson’s side, the Defendant put a gun to the back of Johnson’s head, and all three of them entered the house.

Johnson testified that the Defendant had a hood or something over his face. When they entered the living room, Brewer pushed Johnson down on the floor and told everyone else not to move or he would kill everyone in the house. Johnson said that Brewer started asking where the drugs and money were located and asked the Defendant to search Charles Duane Thomas. Johnson testified that, while the Defendant searched Charles Duane Thomas, Brewer moved his gun back and forth between Johnson and Gamble. Johnson said that Gamble jumped up across the table to get the gun away from the Defendant, and, then, Brewer started shooting his gun. Johnson tried to grab Brewer, and Brewer then shot Johnson. Johnson recalled that he fell back, heard three more shots, and, when he looked up again, Brewer appeared to be out of bullets. Johnson testified that he reached for Brewer, but Brewer went running through the kitchen and went out the back door. Johnson explained that he followed but could not catch Brewer. He said that he got a t-shirt, put it on his stomach, called 911, came back to the den, and collapsed on a chair. He recalled that the police came thirty minutes later and that he was not aware of any property the intruders took from his house. Johnson suffered serious wounds from this incident and spent nearly two weeks in the hospital. He testified that he had no prior dealings with the Defendant and Brewer, who was also known as “St. Louis.” Johnson said that he has a felony conviction for selling drugs and is presently serving a sentence at Drug Court.

On cross-examination, Johnson testified that he had sold drugs from the residence before and admitted that his residence had a reputation as a place where people sold drugs. Johnson did not think that any drugs were inside his residence on the night of the crime. He admitted that he never

heard the Defendant threaten to kill anyone, and Brewer is the only person that he saw shoot his gun. He explained that Gamble had been known to carry a three-fifty-seven magnum gun and a nine millimeter, and the magazine clip found on the coffee table was placed there before the night of the crime. He testified that he did not see Gamble smoke any marijuana on the night of the crime. Johnson thought, but was unsure, that the stocking cap at his house belonged to the Defendant.

On redirect examination, Johnson testified that, on the night of the crime, he never saw the three-fifty-seven magnum or nine millimeter that Gamble usually carried, but Gamble may have put the gun under the couch pillow before going to sleep. Johnson said that the Defendant did not seem surprised when Brewer said he was going to kill everyone in the house.

Charles Duane Thomas testified that he had previously identified the Defendant. He said that, on the night of the crime, he was living at 501 Pappas Court and that he was awakened by the Defendant, who had a hood covering his head, standing over him. Thomas said that the Defendant told Thomas to get on the ground, and Thomas complied and could see Gamble and could hear two other people who were outside his range of vision. He explained that a man who he could not see patted him down and took his wallet. When asked if this man actually took anything, Thomas responded that he did not know if any money was taken, but money lay scattered all over the floor. He recalled hearing the other intruder yell, "where's the money at? Save their live, save their life," and seeing Gamble jump up and grab the Defendant. Thomas saw a gun on the floor after the Defendant and Gamble finished wrestling with each other. Thomas testified that he saw the Defendant's face after the Defendant finished struggling with the victim and fell down. Thomas did not think that there were any drugs at the residence on the night of the crime, but he stated that he, Johnson, and Gamble sold drugs out of the house on previous occasions, and people in the neighborhood knew that drug-dealing occurred at the residence. Thomas did not have a gun on the night of the crime, and the intruders were the only people that he saw with the guns. He testified that, after the Defendant struggled with Gamble and fell to the ground, Thomas asked the Defendant who he was with, and the Defendant replied "St. Louis."

On cross-examination, Thomas testified that Gamble was his best friend and that Gamble owned a three -fifty-seven magnum and a nine millimeter, but, on the night of the crime, he did not see Gamble's guns. Thomas admitted that he last sold drugs in 1999 and that Gamble sold drugs. Thomas recalled hearing three gun shots on the night of the crime, but he admitted that he could have heard more, and he was unsure whether the gun shots all came from the same gun. Thomas acknowledged that he did not know where the gun found on the floor had come from.

Duane Green, an officer with the Nashville Police Department, testified that, on the night of the crime, he was dispatched to the Vanderbilt Hospital because there was a shooting on Pappas Court. He testified that, when a nurse took off the Defendant's clothes, she found some crack cocaine and marijuana in the Defendant's pockets and gave the drugs to Officer Green. On cross-examination, Green acknowledged that he initially said that the drugs belonged to Johnson because Green was confused about from whose clothes the drugs had come. He said that he was present

when the doctors took off the Defendant's clothes and found the drugs in the Defendant's pockets.

Joe Williams, a detective with the Nashville Police Department, homicide division, testified that he was called to the crime scene where he was appointed as the lead detective. When he first arrived on the scene, he saw blood on the front side door and a blood trail that passed through the kitchen and lead to the living room, and, in the living room, he saw Gamble lying by the front door. He explained that a black gun with a brown handle lay near Gamble, that blood was everywhere, and that furniture was moved all around the living room in a state of disarray. Next, Detective Williams went to the hospital where he spoke with Thomas, who told him about the incident, and, the detective then tried to speak with the Defendant, but the Defendant declined, stating that he was in too much pain.

Detective Williams testified that, when Thomas was released from the hospital, Thomas picked the Defendant out of a photographic line-up of different individuals and identified him as the man at the crime scene who was found lying beneath Gamble. The detective testified that the bullets from Gamble's body were retrieved during Gamble's autopsy, and they were entered into evidence during Detective Williams's testimony. Williams testified that a witness, who was in a car that picked up Brewer near the crime scene on the night of the crime, told him that Brewer was the other individual involved in the incident and told him what had happened at the house.

On cross-examination, Detective Williams acknowledged that the bullets removed during Gamble's autopsy were twenty-two (.22) caliber bullets, and the bullet removed from the Defendant was of the thirty-eight (.38), three fifty-seven magnum (.357) class. When asked if the handgun found at the crime scene had a clip in it, the detective said that he thought that the gun's clip was located on the coffee table. He acknowledged that he did not know that one of the witnesses testified earlier that the clip had been on the coffee table before the crime occurred and that the gun found lying on the floor at the crime scene did not contain a clip. Williams acknowledged that the bullet that was recovered from the Defendant's body did not come from the gun that was in the house on the night of the crime and did not come from the gun used to shoot and kill Gamble. He testified that, after searching the house, the police did not find another gun. On redirect examination, Williams testified that the police did not recover the twenty-two (.22) gun used to kill Gamble. On recross-examination, Williams testified that, after conducting the police investigation, he believed that Brewer possessed the twenty-two (.22) gun used to kill Gamble.

Robert Anderson, an officer with the Nashville Police Department, homicide division, testified that he was called to Vanderbilt Hospital to speak with the people involved with the incident. He testified that the Defendant told him the Defendant went to the residence to buy drugs, and, when the Defendant was outside with Johnson, a masked black male took them inside the residence at gun point and demanded money. The Defendant said that he heard gun shots and took out a "blue steel" three fifty-seven (.357) magnum but did not recall if he fired the gun. On cross-examination, Anderson could not recall if a three fifty-seven (.357) gun was recovered during the investigation.

Sergeant Orr, with the Nashville Police Department, testified that he examined a 1992 Oldsmobile Cutlass and developed and collected "latent prints" from the vehicle's interior and exterior. While examining the vehicle, Sergeant Orr noticed that the license plate lettering was covered up with mud, which he thought was unusual, and he processed the area around the license plate for prints. He also processed the trunk area because he believed that someone may have put his hand on the trunk area while smearing mud on the license plate. He took the license plate off the car, and, during his testimony, it was entered into evidence. Sergeant Orr also collected a blue Nautica jacket and roll of duct tape from the vehicle. On cross-examination, Sergeant Orr testified that he just collected the "latent prints," and a "latent examiner" identified the prints.

Dr. Bruce Levy, the Davidson County Medical Examiner, testified as an expert in the field of forensic pathology. Dr. Levy explained that he didn't see any evidence of close range fire around Gamble's wounds, meaning that, when the gun was fired, the gun was more than two feet away from Gamble. He explained that Gamble's wound on the right side of Gamble's back was fatal. Dr. Levy testified that toxicology reports indicated that Gamble's blood tested positive for the presence of marijuana used within several hours of Gamble's death. Dr. Levy stated that, in his opinion, Gamble died as a result of gunshot wounds, and the manner of death was homicide. On cross-examination, Dr. Levy acknowledge that nothing in the autopsy report indicated that any tests were performed to determine if any gun powder or other foreign substances were found on Gamble's hands. Dr. Levy testified that the caliber of the bullet had no bearing on the size of the hole that the bullet created when penetrating the skin. He acknowledged that a ballistics expert would be able to tell the caliber of the bullet recovered from the autopsy.

Wayne Hughes, a firearms and toolmark examiner with the Nashville Forensics and Firearms Division of the Police Department, testified as an expert in the field of ballistics and firearms examination and identification. He explained that he examined two twenty-two (.22) class bullets that were retrieved from Gamble's body during the autopsy. Hughes determined that the bullets were discharged by the same gun. He examined a Bursa semi-automatic pistol that was taken from the crime scene and determined that this pistol did not fire the two twenty-two (.22) bullets. Hughes also examined a thirty-eight (.38), three fifty-seven (.357) caliber bullet and determined that this bullet could not have been discharged from the same gun as the first two bullets that he examined. Hughes testified that he wrote a report detailing his observations, and the report was entered into the evidence.

On cross-examination, Hughes testified that he could tell that the two twenty-two (.22) class bullets came from the same gun because they had similar markings on them. He testified that he was unaware that the three fifty-seven (.357), thirty-eight (.38) bullet that he tested was retrieved from the Defendant's body. He explained that the Bursa pistol could not fire a three fifty-seven (.357) or thirty-eight (.38) bullet.

Charles Lee Freeman, Jr., with the Nashville Police Department, in the homicide division, testified that he participated in this investigation. He said that a couple who lived up the street from the crime scene saw somebody running down the street when the shooting occurred. He said that

he canvassed Pappas Court, and a white car was parked at the corner of Pascal Court and Combs Drive, which is about one hundred yards from 501 Pappas Court. He asked people on the street if they knew to whom the vehicle belonged, and the people stated that they had never seen the car before. He testified that the vehicle was suspicious because nobody seemed to know who it belonged to, and mud was smeared all over the license plate. Using the identification number in the front windshield, Officer Freeman determined that the car was registered to the Defendant.

Lorita Marsh testified that she is an identification analyst with the Nashville Police Department, and that she examined fingerprints collected from the vehicle that Officer Orr processed. She determined that a fingerprint on a Compact Disc (“CD”) taken from the vehicle belonged to the Defendant. Marsh identified two palm prints collected from the trunk of the vehicle, one belonging to the Defendant and one belonging to co-defendant Brewer.

At the conclusion of the State’s proof, the Defendant moved for a judgment of acquittal as to the charges of especially aggravated robbery because the State failed to produce any evidence at trial that a theft had occurred. The trial court granted the Motion for Judgment of Acquittal on the indicted offenses, but it allowed the jury to consider the lesser-included offenses of attempted especially aggravated robbery. The Defendant objected to the trial court’s decision.

Based upon this evidence, the jury found the Defendant guilty of the reckless homicide of Larry Nathaniel Gamble, the attempted especially aggravated robbery of Charles Duane Thomas, and the aggravated burglary of the habitation of Kevin Orlando Johnson. The trial court sentenced the Defendant as a Range I offender to four years for reckless homicide, ten years for attempted especially aggravated robbery, and five years for aggravated burglary. The trial court ordered that the Defendant’s four and ten year sentences be served consecutively, and his five year sentence be served concurrently, for an effective sentence of fourteen years with a 30% release eligibility, and that his sentences from this case be served consecutively to a nine-year sentence that the Defendant was serving from Williamson County.

III. Analysis

On appeal, the Defendant contends that: (1) the evidence at trial is insufficient to support the jury’s verdict; (2) the trial court improperly instructed the jury on the issue of criminal responsibility; (3) the Defendant’s convictions for attempted especially aggravated robbery and aggravated burglary violate principles of double jeopardy; (4) the trial court erred when it allowed a witness to testify as to the alleged statement made by a co-defendant; and (5) the trial court improperly enhanced the Defendant’s sentences and improperly imposed consecutive sentences.

A. Sufficiency of the Evidence

On appeal, the Defendant asserts that the evidence is insufficient to sustain his convictions. In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court

substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 370 S.W.2d 523 (1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004)(citing State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). It is well-settled law in Tennessee that “the testimony of a victim, by itself, is sufficient to support a conviction.” State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); State v. Williams, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.; see State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000).

1. Aggravated Burglary

The Defendant asserts that the evidence is insufficient to sustain his conviction for aggravated burglary because the record does not support the conclusion that the Defendant entered the home of Kelvin Orlando Johnson with the intent to commit a felony, because the record contains no evidence that the Defendant made demands for drugs or money or that the Defendant entered the home with the intent to commit a felony, theft, or assault.

To establish that the Defendant committed an aggravated burglary, the State must prove beyond a reasonable doubt that the Defendant entered a habitation “without the effective consent of the property owner” with the intent to commit a felony, theft, or assault. Tenn. Code Ann. §§ 39-14-402,-403 (2003). In the case under submission, the evidence, when viewed in the light most favorable to the State, proves that Thomas identified the Defendant a perpetrator of these crimes. Thomas described how the Defendant was disguised in a mask and armed with a gun when he entered their home with the co-defendant, “St. Louis,” who made demands for drugs and money. When the police arrived at the crime scene, they found the Defendant underneath Gamble’s body in close proximity to the mask. In addition, the Defendant’s car was parked about one hundred yards

away from the crime scene with mud smeared over the license plate number, which could reasonably be construed as an attempt to obscure the license plate number. The Defendant's fingerprints were found on the car and on an item taken from the car. Given the location of the Defendant's car and the testimony from the victims of these crimes, the jury could properly infer that the Defendant planned to rob the victims when he entered the home on the night of the crime. The Defendant is not entitled to relief on this issue.

2. Attempted Especially Aggravated Robbery

The Defendant asserts that the evidence is insufficient to sustain his conviction for attempted aggravated robbery. Especially aggravated robbery "is the intentional or knowing theft of property from the person of another by violence or putting the person in fear . . . (1) Accomplished with a deadly weapon; and (2) Where the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-401, -403(a)(1)-(2) (2003). "'Serious bodily injury' means bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. 39-11-106(a)(34) (2003). "Deadly weapon" means "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury." Tenn. Code Ann. § 39-11-106(a)(5). Criminal attempt requires that one act "with the kind of culpability otherwise required for the offense . . . [and] with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part." Tenn. Code Ann. § 39-12-101(a)(2) (2003). Therefore, criminal attempt requires two material elements: (1) the culpability required for the attempted crime; and (2) an act in furtherance of the attempted crime. Wyatt v. State, 24 S.W.3d 319, 323 (Tenn. 2000).

Based on the evidence presented at trial, a rational trier of fact could have found the Defendant guilty of the attempted especially aggravated robbery of Charles Duane Thomas. As previously summarized, the evidence established that the Defendant entered another's home while armed and wearing a mask with "St. Louis" who made demands for drugs and money. In addition, Thomas testified that the Defendant took his wallet from his pocket, and after the shooting occurred, money lay all over the livingroom floor. As a result of the crime that Brewer and the Defendant committed, both Kelvin Johnson and Larry Gamble suffered serious bodily injury. Gamble died and Johnson suffered serious gunshot wounds from this incident and spent nearly two weeks in the hospital. Based on this evidence, a reasonable jury could conclude that the Defendant is guilty of attempted especially aggravated robbery.

3. Reckless Homicide

The Defendant contends that the evidence is insufficient to sustain his conviction for reckless homicide. He asserts that nothing in the record indicates that he acted recklessly and that his reckless actions resulted in Gamble's death. He also contends that the State did not recover a weapon that could be identified as having been employed or possessed by the Defendant. The Defendant contends

that the jury, in convicting the Defendant of the reckless homicide, rejected the State's theory of felony murder and implicitly rejected the State's theory that the Defendant was criminally responsible for Brewer's actions.

Reckless homicide is the "reckless killing of another." Tenn. Code Ann. § 39-13-215(a) (2003). Pursuant to Tennessee Code Annotated § 39-11-302 (2003):

"Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's standpoint.

According to the testimony of Charles Thomas and Kelvin Johnson, the Defendant came up to the porch after Brewer pulled out a gun and told them to "get down," and the Defendant entered the home after hearing Brewer tell Johnson to be quiet or he would kill everyone in the house. The Defendant remained in the home while Brewer threatened to kill everyone in the house, and he wrestled with Gamble while the Defendant was armed and after the shooting of Gamble had occurred. The Defendant, by entering another's home armed with a gun, accompanied by a co-defendant who continually threatens to kill the occupants of the home, and by wrestling with another individual while armed, created a substantial and unjustifiable risk that a death would occur. Such actions could reasonably be viewed by the jury as a gross deviation from the standard of care that an ordinary person would exercise under the circumstances. Therefore, in our view, the evidence is sufficient to sustain the jury's verdict, and the Defendant is not entitled to relief on this issue.

B. Jury Instructions

1. Lesser- Included Offense

Next, the Defendant contends that the trial court amended the charges of the indictment from especially aggravated robbery to attempted especially aggravated robbery during trial and that he was therefore convicted of a crime for which he was not charged, denied his constitutional rights to grand jury process, and denied sufficient notice to adequately prepare a defense against these charges. The State counters that attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery, and, therefore, the Defendant was properly put on notice of the charges he was called upon to defend, and the trial court did not improperly amend the indictment.

Tennessee Rule of Criminal Procedure 31(c) provides that "the Defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." The Supreme Court of Tennessee has held that, "an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not

congruent with, all the elements of the lesser.” Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). Since inchoate offenses such as attempt are considered lesser-included offenses of the crime charged, the crime of attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery. See State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999); State v. Mario Rogers, No. W1999-01454-CCA-R3-CD, 2001 WL 721022, at *6 (Tenn. Crim. App., at Jackson, June 26, 2001) *no Tenn. R. App. P.11 application filed*. Since the crime of attempted especially aggravated robbery is a lesser-included offense of especially aggravated robbery, the Defendant was properly put on notice of the charges he was called upon to defend, and the trial court did not err when it granted the motion for acquittal for especially aggravated robbery but provided jury instructions regarding attempted especially aggravated robbery.

2. Natural and Probable Consequences

The Defendant contends that the trial court erred by failing to charge the jury on the natural and probable consequences rule. He asserts that the jury clearly rejected the State’s theory that Gamble was killed in the perpetration of a felony by returning a verdict of guilty to only reckless homicide and not to felony murder, and, therefore, the jury should have been instructed as to the natural and probable consequences rule. The Defendant further argues that the trial court’s error prevented the jury from properly deliberating and applying the correct standard to the Defendant’s role in not only the reckless homicide but also in the attempted especially aggravated robbery and aggravated burglary, and the incomplete charge requires the reversal of all of his convictions. The State contends that trial court did not err when it chose not to charge the jury on the natural and probable consequences rule.

The trial court provided the jury with following charge regarding criminal responsibility.

[U]nder the doctrine of criminal responsibility the defendant may be criminally responsible as a party to the offenses charged in the indictment if the offenses were committed by the defendant’s own conduct, by the conduct of another for which the defendant is criminally responsible, or both. Each party may be charged with the commission of this offense.

A defendant is criminally responsible for an offense or offenses committed by the conduct of another if the defendant solicits, directs, aids, or attempts to aid another person to commit an offense, and the defendant acts with the intent to promote or assist the commission of the offense or to benefit in the proceeds or results of the offense

When one enters into a scheme with another to commit a robbery and a killing ensues, all defendants may be held responsible for the death, regardless of who actually committed the murder and whether the killing was specifically contemplated by the other. As long as the defendant intended to commit the robbery and a killing resulted during the robbery or attempt to commit the robbery, each

defendant is responsible for the murder, regardless of whether he intended for the victim to die or participated in the act of the murder,

Before you find the defendant guilty of being criminally responsible for said offense committed by the conduct of another, you must find that all essential elements of said offense have been proven by the State beyond a reasonable doubt.

The natural and probable consequences rule “underlies the doctrine of criminal responsibility and is based on the recognition that aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put into motion.” State v. Howard, 30 S.W.3d 271, 276 (Tenn. 2000). The doctrine extends the scope of criminal liability to the target crime intended by a Defendant as well as to other crimes committed by a confederate that were the natural and probable consequences of the commission for the original crime. State v. Carson, 950 S.W.2d 951, 954-55 (Tenn. 1997). Pursuant to Tennessee Code Annotated § 39-11-402, a person is criminally responsible for an offense committed by the conduct of another if:

- (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
- (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
- (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

In Howard, the supreme court established that criminal responsibility, based on the natural and probable consequences rule, requires a jury to find:

- 1) the elements of the crime or crimes that accompanied the target crime;
- 2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and
- 3) that the other crimes committed were natural and probable consequences of the target crime.

Howard, 30 S.W.3d at 276. In applying the rule in Howard, this Court held that “the natural and probable consequences rule instruction is required only for incidental crimes and not for the target crime.” State v. Winters, 137 S.W.3d 641, 659 (Tenn. Crim. App. 2003); State v. Mickens,

123 S.W.3d 355, 359 (Tenn. Crim. App. 2003). Felony murder is also an exception to the natural and probable consequences rule because the defendant is statutorily responsible for all homicides committed during the course of the felony, whether or not the homicide was foreseeable. Winters, 137 S.W.3d at 659; See Tenn. Code Ann. § 39-13-202 (2003).

In the case under submission, the Defendant was found guilty of the lesser included offense of reckless homicide under the indicted offense of felony murder, and, therefore, the natural and probable consequence instruction was not required. See State v. Rucker, No. E2002-01201-CCA-R3-CD, 2004 WL 2827004, at *1, 7 (Tenn. Crim. App., at Knoxville, May 20, 2003), *perm. app. denied* (Tenn. Dec. 9, 2004) (holding that the Defendant indicted for felony murder and convicted of criminally negligent homicide was not entitled to the natural and probable consequences instruction for the felony murder count). The Defendant was found guilty of the target crimes of attempted especially aggravated robbery and aggravated burglary. The Defendant was found guilty of the homicide during the commission of the target felonies, and, therefore, the failure to give the jury instruction on the natural and probable consequence rule was not error. The Defendant is not entitled to relief on this issue.

C. Double Jeopardy

The Defendant contends that the charges in the indictment violate his double jeopardy protections afforded by the Fifth Amendment to the United States Constitution and article I, section 10 of the Tennessee Constitution. Specifically, he asserts that he should not have been charged with the attempted especially aggravated robbery of Kelvin Johnson and the aggravated burglary of Kelvin Johnson's home. The Defendant asserts that the Defendant's actions were part of one, continuous act that "apparently" lasted for a short amount of time. The State counters that the Defendant's convictions for attempted especially aggravated robbery and aggravated burglary do not violate the Defendant's double jeopardy protections because each offense contains different elements.

The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, article I, section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. I, § 10. In State v. Denton, 938 S.W.2d 373 (Tenn. 1996), the Tennessee Supreme Court held that "whether two offenses are the 'same' for double jeopardy purposes depends upon a close and careful analysis of the offenses involved, the statutory definitions of the crimes, the legislative intent and the particular facts and circumstances." Id. at 379. In Blockburger v. United States, 284 U.S. 299 (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Id. at 304. In Denton, the Tennessee Supreme Court noted that while appellate review must be guided by the Blockburger test, the test is not conclusive of legislative intent and the reviewing court must also examine: (1) whether there were multiple victims involved; (2) whether several discrete acts were involved; and

(3) whether the evil at which each offenses is directed is the same or different.” 938 S.W.2d at 378-79.

Attempted especially aggravated robbery and aggravated burglary are not the “same” offenses for double jeopardy purposes because each offense requires proof of an element that the other does not. State v. Pillow, No. M2002-01864-CCA-R3-CD, 2004 WL 367747, at *13-14 (Tenn. Crim. App., at Jackson, Aug. 13, 2003) *perm. app. denied* (Tenn. June 21, 2004). Especially aggravated robbery requires a showing that the victim suffered a serious bodily injury during a robbery that was accomplished by the use of a deadly weapon. Aggravated burglary requires a showing that a defendant entered a habitation with the intent to commit a felony, theft or assault. In the case under submission, the Defendant’s actions were discrete acts with different evil purposes. The Defendant entered the home with plans to commit a felony, and, once inside the home, the Defendant committed a separate offense while taking Thomas’s wallet and wrestling with Gamble. Therefore, the Defendant is not entitled to relief on this issue.

D. Right of Confrontation

The Defendant contends that his rights were violated by Detective Williams’ testimony because the state was improperly allowed to bolster its case with a double-hearsay statement, denying the Defendant his constitutional right of confrontation. He claims that the trial court erred by not declaring a mistrial or instructing the jury to disregard Detective Williams’ testimony regarding the co-defendant’s statements made to other witnesses. The State counters that the since the Defendant never properly registered any objection, he has waived his claim.

Tennessee Rule of Evidence 103 provides that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . “a timely objection or motion to strike appears of record, stating the specific ground of objection” The Defendant made no objection to Detective Williams’ testimony during the trial. In the absence of an objection to Detective Williams’s statement at trial, we conclude that the Defendant has waived the issue for purposes of appeal. See Tenn. R. Evid. 103(a).

E. Sentencing

The Defendant contends that the trial court erred when it sentenced him. He asserts that the record does not support the conclusion by the trial court that the Defendant’s criminal record is extensive and that the Defendant was on bond at the time he committed the offenses for which he was convicted. The State contends that the trial court properly sentenced the Defendant.

At sentencing, the trial court enhanced the Defendant’s sentence for the following reasons: (1) the defendant had a previous history of criminal convictions; (2) the offenses involved more than one victim; (3) the Defendant was on supervised release when he committed the crime; and (4) the defendant had a previous conviction involving death. The Defendant offered no evidence of any mitigating factors. In its order addressing the Defendant’s motion for new trial, the court reversed itself on the application of factors (2) and (3), relying apparently on our previous interpretation of

Blakely v. Washington, 542 U.S. 296 (2004),¹ but held that the Defendant's prior criminal record was sufficient to justify the sentences imposed. The trial court reasoned that the Defendant's two prior convictions for involuntary manslaughter and two prior felony drug convictions justified increasing the Defendant's sentence beyond the statutory minimum.

When a defendant challenges the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001); State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In the case under submission, we conclude that there is ample evidence that the trial court considered the sentencing principles and all relevant facts and circumstances. Therefore, we review its decision de novo with a presumption of correctness. Accordingly, so long as the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the factual record, this Court may not disturb this sentence even if we would have preferred a different result. See Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Cmts.; State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We note that the defendant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; Ashby, 823 S.W.2d at 169.

Attempted especially aggravated robbery is a Class B felony. Tenn. Code Ann. §§ 39-14-402, 403(b) (2003). The sentencing range for a Range I offender convicted of a Class B felony is eight to twelve years. Tenn. Code Ann. § 40-35-112(a)(2) (2003). Aggravated burglary is a Class C felony. Tenn. Code Ann. §§ 39-13-402, 403. The sentencing range for a Range I offender

¹ This interpretation, articulated in State v. Gomez, No. 2002-012-09-CCA-R3-CD, 2004 WL 305787, at *1 (Tenn. Crim. App., at Nashville Feb. 18, 2004) *appeal granted* (Tenn. Oct. 14, 2004), was reversed by State v. Gomez, 163 S.W.3d 632, 651-51 (Tenn. 2005), which held that Blakely did not establish a new rule of law and does not apply to Tennessee's sentencing scheme.

convicted of a Class C felony is three to six years. Tenn. Code Ann. § 40-35-112(a)(3). Reckless Homicide is a Class D Felony. The sentencing range for a Range I offender convicted of a Class D felony is two to four years. Tenn. Code Ann. § 40-35-112(a)(3).

In the case under submission, the evidence does not preponderate against the findings of the trial court. The record in this case supports the trial court's conclusion that the Defendant's criminal record is extensive. The Defendant's presentence report shows that the Defendant has two involuntary manslaughter convictions and convictions for assault, drug possession, possession of narcotic equipment, possession of drug paraphernalia, evading arrest, and driving with a suspended license. These offenses constitute an extensive criminal history that justified the trial court's decision to enhance the Defendant's sentences to four years for the reckless homicide, ten years for the attempted especially aggravated robbery, and five years for the aggravated burglary. Therefore, the Defendant is not entitled to relief on this issue.

The trial court did not abuse its discretion when it ordered that the Defendant's four and ten year sentences be served consecutively, and his five year sentence be served concurrently, and that his sentences from this case be served consecutively to a nine-year sentence that the Defendant was serving from Williamson County. According to Tennessee Code Annotated section 40-35-115(b) (2003), a court may run sentences consecutively if the court finds by a preponderance of the evidence that the defendant is an offender whose record of criminal activity is extensive. As previously discussed, the record in this case supports the trial court's conclusion that the Defendant's criminal record is extensive due to the Defendant's two prior convictions for involuntary manslaughter and two prior felony drug convictions. After reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding that two of the three sentences imposed in this case should run consecutively and that all three sentences should be served consecutively to the prior sentence from Williamson County.

III. Conclusion

In accordance with the foregoing, we conclude that the trial court did not commit reversible error. Therefore, the judgments of the trial court are affirmed.

ROBERT W. WEDEMEYER, JUDGE